1983

Diane M. Jorgensen and Craig M. Jorgensen v. Salt Lake City Corporation, A Body Corporate And Politic Under The Laws of The State of Utah, and the Board of Adjustment of Salt Lake City : Brief of Respondents

IN THE SUPREME COURT OF THE

STATE OF UTAH

DIANE M. JORGENSEN and CRAIG M. JORGENSEN, Plaintiffs and Appellants,	)	Case No. 19261
vs.	)	
SALT LAKE CITY CORPORATION, a body corporate and politic under the laws of the State of Utah, and THE BOARD OF ADJUSTMENT OF SALT LAKE CITY, Defendants and Respondents.	)	

BRIEF OF RESPONDENTS

Appeal from the Judgment of the Third Judicial District Court for Salt Lake County
Hon. Ernest F. Baldwin

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IN THE SUPREME COURT

STATE OF UTAH

DIANE M. JORGENSEN and CRAIG M. JORGENSEN, Plaintiffs and Appellants, vs. SALT LAKE CITY CORPORATION, a body corporate and politic under the laws of the State of Utah, and THE BOARD OF ADJUSTMENT OF SALT LAKE CITY, Defendants and Respondents.	RESPONDENT'S BRIEF Case No. 19261

I.

NATURE OF PROCEEDING

This appeal is from a final District Court judgment affirming a Salt Lake City Board of Adjustment's, decision denying appellant-Jorgensens' request for a conditional use to operate a day-care business from their home located in a Residential "R-2" zone.

II.

DISPOSITION IN LOWER COURT

On April 19, 1982, the City's Board of Adjustment duly denied Mrs. Jorgensen's request for a conditional use permit to operate a registered family day care business in her home. Appellants, Mr. & Mrs. Jorgensen, timely filed a "Complaint and Petition for Relief" in the Third Judicial District Court in

compliance with Section 10-9-15 Utah Code Ann., 1953. Jorgensens prayed for and obtained a preliminary injunction to continue their business pending an expedited trial.

The Board filed a Motion to determine the scope of judicial review of the matter. After argument, the lower court ruled that its review of a Board of Adjustment decision was an exercise of the court's traditional appellate jurisdiction. It would not conduct an evidentiary trial de novo; rather, it held that judicial review was limited to the issues and evidence before the Board. The legal standard for said review was whether the Board's decision was arbitrary, illegal or a capricious abuse of the Board's power. Other aspects of the Motion were not ruled upon. (R 83-94).

Within those parameters, the court received evidence and testimony regarding the matters before the Board. The lower court ruled the record supported the Board's decision and that it was not unreasonable, arbitrary, illegal or capricious. (R 118). As such, it affirmed and upheld the Board of Adjustment's order and decision. (R 119). A copy of the Judgment is attached as Appendix Exhibit A or "App. A".

III.

RELIEF SOUGHT ON APPEAL

Respondents Salt Lake City and its Board of Adjustment seek the ruling of the District court to be affirmed.

IV.

STATEMENT OF FACTS

The less than complete description of the facts by the Jorgensens in their Brief and mischaracterizatons of facts they did cite, inaccurately represents and distorts the actual facts. Included below is a synopsis of the relevant facts:[1]

A. Legislative framework. (App. B, paragraphs 1-9).

1. State law[2] regulates and licenses child care businesses, when that care is provided for more than 2 children for more than 4 hours in any one day. The Division of Family Services ("DFS") administers the regulations and issues the state licenses. Their rules note that licensees must also comply with applicable local ordinances, such as zoning requirements. (R 16, 18, 73).

2. Before 1981, Salt Lake City had passed ordinances concerning child day-care businesses for general health, sanitation and safety conditions. The ordinances required a Regulatory Permit from the City-County Health Department after a premises inspection. (R 16, 31).

3. Under City zoning laws, such businesses were permitted as a "conditional use" in the mixed use "R-6" residential districts. Day-care businesses, along with other businesses,

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[1]For a more explicit recitation of the facts and statutory law and supporting citations to the record see Appendix Exhibit "B" or "App. B."

[2]Section 55-9-1, et seq. U.C.A. A copy is attached as Appendix Exhibit "C".

were precluded in the more restricted "R-1" through "R-5" residential zones. (R 74, 75).

4. Restricted home occupations do not contemplate or permit group activity. The City's Board of Adjustment had previously heard two cases from preschools/day care businesses, which also unsuccessfully sought Board interpretations in order to gain a liberalization of the zoning scheme. All such requests had consistently and uniformly been denied but the Board had requested consideration of comprehensive policy revision. (R 18, 19, 75).

B. Origination of the Initial Controversy. (App. B, paragraphs 10-24).

5. Appellant-Jorgensens' occupied the tope of a home converted into a duplex, which was located in a duly adopted "R-2" zone.

6. Mrs. Jorgensen's business involved providing regular day-care in 1980 for 10 different children in her home, which averaged from 3 to 6 children present on various days.

7. The City's Zoning Department investigated a complaint registered by neighbors, and ruled the day-care business violated the "R-2" zoning.

8. Mrs. Jorgensen appealed the ruling to the Board, contesting it was not a childrens day-care center business, but a home occupation use. Mrs. Jorgensen appeared with counsel at a public hearing before the Board on this issue known as Case

7. Twelve other residents in the area, bearing a petition signed by 27 area residents, urged the Board not to adopt the proposed interpretaton, which would substantially liberalize then existing zoning policy.

9. Appellant-Jorgensen presented testimony to the Board and responded to her neighbors' opposition.

10. In its deliberations, the Board requested a legal opinion and deferred action to its next meeting, at which time the Board determined the business did not qualify as a home occupation use in a "R-2" zone. The Board noted that there were pending proposals for ordinance revisions, but that changes sought by Appellant-Jorgensens must be made through the City's legislative body.

C. First Lawsuit and Ordinance Revision. (App. B, paragraphs 25-33).

11. Jorgensens appealed the Board's decision in Case 8457 to the Third District Court, seeking declaratory and injunctive relief.

12. In order to obtain a preliminary injunction in the aforesaid suit and thereby permit the continuation of business pending trial, appellant-Jorgensen was required to comply with the terms of the proposed ordinance and obtain DFS licensing. This State requirement forced a reduction of the number of children to a maximum of 6, which number was to include her own preschoolers.

13. In November 1981 the new ordinance was modified and adopted by the City's seven member elected City Council. It required each request for a conditional use to operate a "Registered Home Day Care" in homes for groups of 3-6 children to go before the City's Board of Adjustment in a noticed public hearing unless the owners of property within an 85' parameter (the "Neighborhood") indicated in writing their consent or lack of objection to approval of the conditional use permit. Bill 78 of 1981, effective November 1, 1981 is attached in appendix Exhibit "D".

14. The parties stipulated to dismissal of the aforesaid First Lawsuit, with prejudice, so appellant-Mrs. Jorgensen could apply under the new legislation.

D. Case No. 8891 - The Second Board Case. (App. B paragraphs 33-47).

15. On March 5, 1982 appellant-Mrs. Jorgensen applied to the Board for a conditional use to operate a "registered home day care" facility in her home. In this application ("Case 8891") the request was to care for up to 5 children at one time.

16. The required public hearing was scheduled for March 22, 1982 and notices duly mailed. As the item was called, a clerical error in the agenda classification was noted, in that the use was identified as a "preschool", rather than a "day-care" application. This matter was noted and corrected. No one claims prejudice by this correction.

17. Appellant-Mrs. Jorgensen appeared again with counsel to make her presentation. She was permitted to fully present her case, including the status of the First Case, the First Lawsuit and all the facts of her desired use in context of the new City ordinances. At this lengthy hearing, owners of three separate properties within the Neighborhood appeared and testified in opposition to the request and submitted written opposition from owners of two more parcels. One mother employing Mrs. Jorgensen appeared in her support. Appellant-Jorgensens had the opportunity with counsel to confront and respond to the opposition.

18. Although a legal quorum was present, two Board members were absent. Therefore, after discussion, the Board voted to continue deliberations over for two weeks to its next meeting in order to have the benefit of the full membership on what it knew was a controversial decision. Deliberations were recommenced on April 5, 1982. After due consideration of all evidence, the new City ordinance and legal arguments, the Board voted 5/0 to deny the conditional use request, because it failed to satisfy all of the legislative criteria.

E. Second Lawsuit and Trial.

19. The District Court reviewed all of the evidence before the Board of Adjustment and ruled it acted lawfully and not

arbitrarily, capriciously or unreasonably. [3]

V.

ISSUES

1. When considering requests for relief from municipal Boards of Adjustment:

(a) What is the District Court's jurisdiction and scope of review?

(b) Is there a rebutable presumption of validity of an administrative Board's decision?

(c) Is the burden of proof on the challenger to establish the administrative Board erred?

2. Did the lower court err in applying the traditional standards of appellate review in this case.

3. Did the lower court err in receiving all information before the Board in order to make a full or plenary judicial scrutiny.

4. Did the lower court err in determining that: (a) the allegations of procedural or substantive irregularities were either not substantiated or of no prejudicial effect; and (b) the Board's decision was a valid and reasonable act, supported by the evidence.

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[3]Contrary to Appellant's assertion, the Court did not grant a stay of its decision, absent the proper filing of a supersedeas bond. (R 118-119; see copy of Judgment attached as "App. A").

VI.

ARGUMENT

POINT I

THE DISTRICT COURT PROPERLY AFFIRMED THE BOARD OF ADJUSTMENT'S DECISION DENYING THE REQUEST FOR A CONDITIONAL USE PERMIT.

A. THE LOWER COURT APPLIED THE APPELLATE STANDARD OF REVIEW IN SCRUTINIZING A BOARD OF ADJUSTMENT DECISION.

District courts are given two types of jurisdiction under Section 7, Article VIII of the Utah State Constitution; these are generally characterized as original and appellate. Said section specifically grants the district courts appellate jurisdiction and supervisory control over all inferior courts and tribunals.

Specifically, with regard to the matter before this Court, Utah statutory law provides:

> "Judicial review of a board's decision--time limitation. The city or any person agrees by any decision of the Board of Adjustment may have and maintain a plenary action for relief therefrom in any court of competent jurisdiction; provided, petition for such relief is presented to a court of competent jurisdiction within 30 days after the filing of such decision in the office of the Board." Section 10-9-15 Utah Code Annotated, 1953.

This statute had three purposes:[4] (1) To require the petition for judicial appellate review to be filed within 30

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[4]Without the existence of Section 10-9-15 U.C.A., judicial review of a City Board of Adjustment as in counties, would proceed via Rule 65(B), Utah Rules of Civil Procedure which did not provide these functions prior to passage of Rules 81(d) and 73.

days; (2) To fix an ascertainable event to trigger the commencements of the limitation period, in this case the date of filing of the decision in the Board's office; and (3) To clarify that the reviewing court is not confined solely to the certified findings, but a full and plenary action requires consideration of all evidence and information presented and considered by the Board.

This universally accepted principle is summarized by McQuillin as follows:

> "In other words, the scope of judicial review and inquiry is limited to whether the determination of the zoning board is unreasonable, arbitrary or an abuse of discretion on the facts or is an illegal error. And the reviewing court is required to consider the evidence most favorable to the decision of the zoning authorities." 8A McQuillin, Municipal Corporations, §25.334 at p. 472 (Emphasis added).

This Supreme Court has not, at this writing, expressly ruled on the standard of review to be applied by the District Court in reviewing a decision arising from a municipal Board of Adjustment under Section 10-9-15, Utah Code Ann.[5] However, it has ruled on the nearly identical one regarding the appropriate standard of review of local county zoning board administrative decisions. Cottonwood Heights Citizen Association v. Board of Commissioners of Salt Lake County, 593 P.2d 138 (Utah, 1979).

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[5]Case No. 18333, Gary J. Xanthos v. Board of Adjustment of Salt Lake City, briefed in 1982 and was argued on November 17, 1983 presents the identical issue now presented in this case.

This case was brought by a citizen group contesting the administrative act of the County in issuing a special conditional use permit to allow construction of a large apartment complex, after modification of a plan which had earlier been rejected. Before addressing specific factual issues at play, this Court laid the rules for judicial review of zoning decisions; it stated:

> "In addressing the plaintiff's attack upon the judgment, there are certain rules to be considered. Due to the complexity of factors involved in the matter of zoning, as in other fields where the court reviews the actions of administrative bodies, it should be assumed that those charged with that responsibility (the commission) have specialized knowledge in that field. Accordingly they should be allowed a comparatively wide latitude of discretion and their action endowed with the presumption of correctness and validity which the court should not interfere with unless it it shown that there is no reasonable basis to justify the action taken." Cottonwood Heights Citizen Association v. Board of Commissioners of Salt Lake County, Id. at p. 140 (Emphasis added).

In establishing such rules, the court has merely clarified and clearly extended to zoning administrative cases the general rules of appellate review applied in earlier zoning cases. See Gayland v. Salt Lake County, 11 U.2d 307, 358 P.2d 633 (1961) (denial of rezoning to commercial use); Naylor v. Salt Lake City Corp., 17 U.2d 300, 410 P.2d 764 (1966) (rezoning from "R-6" to "B-3"); Crestview-Holladay Home Owners Assn., Inc. v. Engh Floral Corp., 545 P.2d 1150 (Utah, 1976) (rezoning from agricultural-residential to commercial).

The issuance and consideration of whether or not to grant conditional use permit by a Board of Adjustment requires consideration of the same complicated and inter-related areas of zoning and land use policies as it does by a county commission. Such factors are not simple ministerial functions, but are complex discretionary decisions involving the balancing of interests and public policy. Such a Board should be entitled to the same respect which the Court has already extended to the decisions on conditional uses made by a County Commission, which is, in reality, merely exercising parallel administrative authority when it reviews such conditional use permits.

Appellant-Jorgensens argue, without citation of relevant authority, that the existence of Section 10-9-15 U.C.A. somehow dictates a substantive change of a law regarding appellate review.[6] They suggest that the holdings of the Supreme Court in applying that traditional appellate standard of review to zoning decisions relating to conditional uses made by county administrative bodies should not apply to municipal statutory bodies performing the identical factors. In effect, appellants urge this Court to read the statute to transform a reviewing District Court into a super Board of Adjustment, free to substitute its judgment and land use philosophy or bias for that of the statutory local Board, without determining whether or not

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[6]See pp. 18-23 Appellant-Jorgensens' Brief.

Board's original decision was illegal or unreasonable and [illegible] by being unsupported by the evidence.

Such a position would require this Court to reverse soundly reasoned case law and alternatively, Jorgensens' theory would create the undefensible result that a person who desires to challenge an action by a zoning administrative body, either denying or granting conditional use permit, would have entirely different remedies and standard of judicial review depending solely whether his property is located in a City, arising under Section 10-9-15, or in an unincorporated area under County control, where there is no similar statute of limitation. Properly, the lower court rejected such theory.

The lower court's decision to apply an appellate standard of review to the administrative zoning decision was consistent with the law regarding review of zoning boards. It also makes a consistent rule of interpretation for parties contesting the zoning actions throughout the State, regardless of whether the property is within or without City limits. This Court should affirm that a reviewing district court's duty is to determine if the local zoning commission or Board of Adjustment acted illegally or in excess of their power or without reasonable relationship to the evidence and information before them and, therefore, were arbitrary and capricious.

The lower court in this case applied the appropriate appellate standard of review and did not err.

B. THE COURT PROPERLY PROVIDED APPELLANTS A "PLENARY ACTION" IN SCRUTINIZING THE BOARD OF ADJUSTMENT'S DECISION.

The lower court in this case conducted a plenary or full, complete, and unqualified scrutinizing of an administrative decision, as required by Section 10-9-15 U.C.A. It did conduct a full or plenary scrutiny, under its appellate jurisdiction, of the record made, evidence presented to, and information known and used by the Board in its deliberations.

The Jorgensens did not object to the Court's declining to conduct an evidentiary trial de novo to their "plenary action." However, Jorgensens' primary legal theory is that the Court erred only in its failure to: (a) Ignore the Board's decision and evaluate the merits de novo based upon the court's understanding of the City's legislative policy, and (b) redetermine and reweigh the facts in light of its own philosophy and experience, as a matter of original jurisdiction.[7]

Appellant-Jorgensens' theory is not supported by a careful reading of the case cited in their Brief.[8] Furthermore, the only Utah case which both parties could locate interpreting the word "plenary" arose from a 1940 case: Denver & R.G.W.R. Co. v. Public Service Commission, 98 U. 431, 100 P.2d 552 (1940). This case

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[7]See, pp. 18 of Appellant-Jorgensens' Brief.

[8]Mashunkashey v. Mashunkashey, 134 P.2d 976, (Okla. 1942) involves a case deciding whether congressional "plenary" powers retained over Indians and their tribal property preempted State law on intestamentary inheritance.

involved the challenge of a Public Service Commission ("PSC") decision. Here the Utah statute authorized any person aggrieved to "... bring an action ... for a plenary review ... which shall proceed as a trial de novo". In addressing what is required by that statute, this Court held that judicial "plenary review" required a "full review, a complete review"; it also held that the phrase "trial de novo" did not change the appellate nature of the review, but it only insured that a complete review would be conducted by the lower court. Id. at p. 555.

Significantly, the Court explained that in judicial scrutiny of an administrative act, even the statute's express language of "trial de novo" did not change the standard of appellate review. This Court held that such language did not contemplate a complete retrial upon new evidence or reweighing of those facts. Such a review, it was held, would be inconsistent with the function of judicial supervision. Thus, the statutory language was interpreted to be a trial upon the record made before the administrative body. In so ruling, the Court interpreted "plenary" and observed:

> "What the legislature has done by section 9 is to increase the scope of the court's review of the record of the commission's actions to include questions of fact as well as questions of law. A submission to the court of the application, together with testimony other than the record before the court was not contemplated." (Emphasis added). Id. at p. 555.

In 1955, a second D&RG case further expounded on the proper scope of judicial review of administrative bodies, Denver & Rio

Grande Western Railroad Company v. Central Weber Sewer Improvement District, 4 U.2d 105, 287 P.2d 884 (1955). This case arose under a statute which provided a remedy for property owners protesting improvement district tax assessments; it required the taxpayer to apply for a writ of review of the actions of the board. Similar to Section 10-9-15 U.C.A now under Court review, this law made no grant of trial de novo.

Plaintiffs, as taxed property owners, urged they were entitled to a district court trial de novo in all respects. The sewer district urged that by writ only the certified evidence and the official record of the administrative body were reviewable. The court held a review of the full record must be made to determine if due process had been satisfied. If the written record reveals that the administrative body complied with this process and the facts of record either support or negate the decision, then the scrutinizing court need only examine the record before the body to determine if an abuse of discretion occurred. However, if the written record was inadequate to make that type of a determination, the lower court was entitled allow the record to be supplemented to determine what all the facts were before the administrative tribunal. Thereafter, the Court could review the factual considerations of the Board in the process of making its analysis.

In a recent 1976 Utah case of Peatross v. Board of Commissioners of Salt Lake County, 555 P.2d 281 (Utah, 1976) the

holding of the 1955 D&RG v. Central Weber case was affirmed. The Lutross case arose out of the County Commission's administrative revocation of plaintiff's massage/health studio license. Plaintiff appealed to the district court via extraordinary writ under Rule 65(B), U.R.C.P. claiming the right to a trial de novo. The lower court refused and, like the case at bar, the lower court ruled it would only review the record before the administrative board to determine if it acted illegally, capriciously or arbitrarily.

Upon an interlocutory appeal, the Supreme Court affirmed the lower court ruling, acknowledging the lower court's constitutional responsibility to provide appellate review to supervise the inferior courts and tribunals.[9] It also held that actions arising under Rule 65(B) for judicial review were to be considered by the lower court: (1) under its traditional appellate jurisdiction, and (2) without entitling the court to conduct an evidentiary trial de novo. This Court reaffirmed, holding:

> "The standard rule is that appellate jurisdiction is the authority to review the actions or judgments of an inferior tribunal upon the record made in a tribunal, and to affirm, modify, or reverse such action of judgment." Id. at p. 284 (Emphasis added).

The court further stated:

> ". . . Where the defendant board has conducted a

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[9] Section 7, Article VIII of the Utah State Constitution.

hearing that comported with due process requirements, and there is no express statutory grant of a trial de novo, the plaintiff is mistaken on her insistence that she is entitled to one as a matter of right. However we deem it appropriate to observe that notwithstanding what we have said herein, the petition for and the issuance of an extraordinary writ upon Rule 65(b) is in the nature of a proceeding in equity; and we do not desire to be understood as foreclosing the proposition that the district court in the exercise of its general powers as hereinabove pointed, could take evidence if it required that the interest of justice so required." Id. at p. 284 (Emphasis added).

The law is consistent with a proper respect for the separation of powers. "Plenary action" for relief from a zoning adminstrative decision is a review to assure that minimum due process of law is observed and to review the evidence presented to these specialized administrative boards to assure that they do not act illegally, arbitrarily or capriciously. The lower court properly performed its function and appellants' urging to have District Courts sit as super boards of adjustments should be rejected.

C. THE LOWER COURT PROPERLY ADMITTED ALL EVIDENCE OF INFORMATION AND CONSIDERATIONS BEFORE THE BOARD.

It is ironic that Jorgensens' argue that the type of hearing mandated before the lower court is to be a full scrutiny of the evidence and information before the Board, yet they claim prejudicial error by the lower court receiving the record of the Board's First Case No. 8457, over objection. Admitting that evidence was not error; it was completely admissible under the

rules of evidence and was necessary to conduct a "plenary" review analysis of the Board's decision under Section 10-9-15 U.C.A.

1. Relevancy. In response to the objection on the ground of relevancy, the court specifically made a finding that, inasmuch as it was compelled to conduct a full review of the Board decision, it desired all the evidence and information before the Board, as it considered the issues.

The facts are not in dispute that Case 8457 was physically in front of the Board. Without the benefit of Case 8457, the lower court noted, it would be handicapped with less than the full record. The necessity and relevance was obvious and undisputable, although the court acknowledged that the weight or materiality of the information contained therein was not being determined.

The Court noted that the technical issues in these two cases were different; however, the parties, the property owners and neighbors were (in fact) the same. The lower court was fully aware of the ordinance change and that the legal issues had changed. In fact the Findings of the Board's Second Case 8891 clearly show that the Board knew of the change of policy contained in the New Ordinance and that it was the Board's responsibility to apply the new criteria to the facts at hand.

Those relevant facts were facially obvious from the discussion of the later Case No. 8891. (R 20-23). The lower

court saw through the inconsistency of appellant-Jorgensen's argument. It would have been a distortion to improperly limit the Court's factual review and eliminate a portion of the record clearly and properly within the Board's and all parties' knowledge. Exclusion of this historic backdrop and evidence would be inconsistent with the mandate of a meaningful judicial plenary review.

2. Inadmissibility. A review of Case No. 8457 demonstrates the hearings and deliberations were conducted in open meeting by the Board after notice. Appellants were present and represented by counsel, exercised their opportunity to orally present their case to the decisionmakers and to confront opposition and counter adverse evidence presented. Minutes reflect that at the hearing the introduction was made by the staff of the issues and background. Jorgensens were given an opportunity to be present with counsel and provide all of the supporting documentation and rationale for their request. Interested parties were given opportunity to give public comment and Jorgensens were given and exercised the opportunity to respond to those allegations. R 16-19, App. B, paragraphs 18-24.

In the U.S. Supreme Court case of Goldberg v. Kelly, 397 U.S. 254, 25 L.Ed.2d 287, 90 S.Ct. 1011 the elements of fundamental due process by administrative bodies were enumerated. The Court dealt with New York's administrative procedure of disqualifying welfare recipients. That procedure

did not provide a hearing with the elements of due process until after benefits had been terminated. The court's finding was only that the due process requirements offered in the termination hearing must occur prior, rather than subsequent to benefit termination. The court did set forth the necessary elements of due process by administrative bodies; however, contrary to the inference of Jorgensen's brief, it did not require the formalities of a judicial setting. The essential elements of due process include:

> "The fundamental requisite of due process of law is the opportunity to be heard. (citations omitted) The hearing must be 'at a meaningful time and in a meaningful manner.' (citations omitted) In the present context these principles require that a recipient having timely and adequate notice detailing the reasons for a proposed determination, and an effective opportunity to defend by confronting any adverse witnesses and presenting his own arguments and evidence orally. . . ." Id. at p. 268-69.

Such rudimentary fundamental elements of due process were more than satisfied when the Board provided an opportunity for the plaintiff to appear with counsel and be heard at a meaningful time prior to the action and in a meaningful manner. In this case the record amply demonstrates that the Jorgensens' rights of procedural and substantive due process were not violated and did not taint the proceedings of either case, and Case 8457 was not inadmissible.

3. Hearsay. Additionally the contents of Case 8457 are admissible as an express exception to the heresay rule.

Exhibit D-2 is the certified copy of an official document of the Salt Lake Board of Adjustment. The Board's secretary certified it is a correct copy of the contents of the official Board file known as Case No. 8457. The case file constituted an official public and business record of the Board that is normally retained and the certification came from the party having the custodial responsibility therefor. (Certification, Ex. D-2). Said record was thus certified and authenticated pursuant to the provisions of Rule 68 of the Utah Rules of Civil Procedure. Thus, Exhibit D-2 of case 8457 is expressly admissible as exceptions to the heresay objection under Rule 63(16-17).

The existence of the public records were known to Jorgensens, and were placed in controversy by their Complaint. (R3-20). Its admission was clearly proper and within the Court's power of discretionary evidence receipt.[10]

D. THE COURT DID NOT ERR IN AFFORDING THE BOARD'S DECISION WITH A REBUTTABLE PRESUMPTION OF VALIDITY AND IMPOSING THE BURDEN OF PROOF ON APPELLANT TO PROVE ILLEGALITY OR ARBITRARINESS.

In the unusually well reasoned decision of Williams v. Zoning Adjustment Board of the City of Laramie, 383 P.2d 730 (Wyo. 1963), the granting of variance by a board of adjustment was challenged. In that opinion, Judge McIntire took the opportunity to specifically address issues posed in this case,

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[10]Rule 64, Utah Rules of Evidence; D&RGW v. Public Service Commission, supra.

including: (a) standard of judicial review, (b) type of evidentiary hearing required, (c) the presumed validity of an administrative board's decision, and (d) when courts are free to substitute their own judgment for that of a board. He correctly summarizes the general principles of law as follows:

> "In keeping with the general rule that, in the absence of evidence to the contrary, public officers will be presumed to have properly performed their duties and not to have acted illegally, decisions of zoning boards of adjustment as to exceptions and variations are regarded as presumptively fair, reasonable and correct; and the burden is upon those complaining thereof to show the board acted improperly." (citations omitted). Id. at 733 (emphasis added).[11]

Those same principles of rebuttable presumptions and burdens of proof have also been clearly adopted by this Court. In Cottonwood Heights, this Court observed:

> ". . . and their action [administrative conditional use permit], endowed with a presumption of validity which the court should not interfere with unless it is shown that there is no reasonable basis to justify the action taken." 593 P.2d at p. 140. (Emphasis added).

It is for the challenger of an administrative action to bear

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[11] See also Ivankovich v. City of Tucson, 22 Ariz.App. 530, 529 P.2d 242 (1974); Whitcomb v. City of Woodward, 616 P.2d 455 (Okla.App. 1980); Eason Oil Co. v. Uhls, 518 P.2d 50 (Okla., 1974); Siller v. Board of Supervisors of City & County of San Francisco, 25 Cal.Rptr. 73, 375 P.2d 41 (1962).

the burden to show the decision is arbitrary and capricious.[12] The court has indicated that it is not appropriate for the judiciary to invade the administrative branch of government. It should not attempt to substitute its judgment, absent prior finding that clear and convincing error exists or "that there is no reasonable basis whatsoever to justify it and its action must therefore be regarded as capricious and arbitrary."[13]

Similar instructions but in greater specificity have been given by the Kansas Supreme Court in the case of Richard v. Fundenberger, 1 Kan.App.2d. 222, 563 P.2d 1069 (1977). It instructed the lower court:

> "The power of the district court, in reviewing zoning determinations, is limited to determining (1) the lawfulness of the action taken, that is, whether procedures in conformity with law were employed, and (2) the reasonableness of such action. In making the second determination, the court may not substitute its judgment for that of the governing body and should not declare the action of the governing body unreasonable unless clearly compelled to do so by the evidence. (citations omitted). There is a presumption that the governing body cited reasonably and it is incumbent upon those attacking its action to show the unreaonableness thereof by a preponderance of the evidence. (Citations omitted)." Id. at p. 1071.

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[12] Gayland v. Salt Lake County, supra and 4 R. Anderson, American Law of Zoning, §25.26, p. 263 (2nd Edition 1977).

[13] Naylor v. Salt Lake City Corp., supra at p. 766, see also Siller v. Board of Supervisors of City & County of San Francisco, supra at p. 44; Monte Vista Professional Building, Inc. v. City of Monte Vista, 531 P.2d 400 (Colo.App. 1975); Whitcomb v. City of Woodward, supra at p. 456 and Rickard v. Fundenberger, supra, at p. 1072.

Consequently, it is naive or unrealistic for any challengers to an administrative decision to assume that the plenary action relieves him/her from the significant burden to rebut the presumption of validity by clear and convincing evidence of error. Jorgensens properly did not prevail because their facts in the record could not meet that test. At best as discussed in Point II they demonstrated the issue was one over which reasonable parties may disagree, but the Board committed no errors requiring invalidation on the grounds of illegality.

E. THE COURT PROPERLY DECLINED TO SUBSTITUTE ITS DECISION FOR AND ASSUME THE BOARD'S POWER ABSENT A FINDING OF ILLEGALITY OR UNREASONABLENESS.

The real epicenter of this appeal focuses on the lower court's ruling that, under appellate standards of review, it would not substitute its judgment over that of the Board. It properly understood the judicial rule to uphold the Board's decision, absent convincing evidence pursuading him that Board's act was illegal, arbitrary or capricious from the record and evidence before the Board.

As most recently repeated in the Cottonwood Heights case, supra, this Court requires judicial restraint in such instances because it recognizes that zoning issues are deceptively complex. The legislature has specifically charged these issues to an administrative body to handle. These boards, which deal frequently with such issues, develop a specialized experience and

expertise in the area that cannot be duplicated in the isolated cases that come for judicial scrutiny. For this reason and to respect the separation of powers principles, the Court has clearly held that the judiciary should not interfere "unless it is shown there is no reasonable basis to justify the action taken."[14] To rule otherwise would deny boards the power to perform their statutory responsibilities involving discretionary administrative judgments. These boards bring, not only their talents and leadership, but their cross section of the knowledge of the unique characteristics of the neighborhoods with which they are familiar. They know of the impact of zoning on people's lives and have to make difficult questions. They know the interrelationships of purposes underlying the ordinance requirements, the policies, the competing interests, and the technical loopholes that cause abuse. They experience the tension of opposition and disappointment from denying a desired request, just as courts do, and they are equally sensitive to the fundamentals of fairness. They are guided by a purpose to delicately balance people's requests against the objectives and policy of zoning legislation that they only have power to implement, not make.

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[14] Cottonwood Heights, supra p. 140. See also Naylor v. Salt Lake City Corp., supra at p. 766, see also Siller v. Board of Supervisors of City & County of San Francisco, supra at p. 44; Monte Vista Professional Building, Inc. v. City of Monte Vista, supra at p. 402-3; Whitcomb v. City of Woodward, supra at p. 456 and Rickard v. Fundenberger, supra, at p. 1072.

Secondly, judicial deference to these specialized administrative boards preserves the constitutional purposes of separation of powers by a system of checks and balance. Section 10-9-15 or Rule 65(B) U.R.C.P. is the judiciary's check on administrative bodies, but limiting review to the record under a standard of illegality or capriciousness respects the executive's role in administering the law. It keeps Courts from becoming super Boards of Adjustment, where the administrative boards act only as a screening body and every unsuccessful applicant gets a new de novo hearing. Such a system would burden the courts and effectively makes the Boards only recommendary and advisory panels to the judiciary, who would make formal policy decisions. The courts lack the Board's broad perspective and are more likely to consider the issues in a microcosmic setting; they lack exposure and sensitivity to the whole comprehensive zoning scheme and should not be placed in that policy implementing role.

Thirdly, failing to give deference to the Board provides no sense of order and predictability in such matters; it undercuts the orderly consistent administration of zoning issues.

Fourth, the doctrine of judicial restraint precludes forum shopping and encourages full presentations of the facts at the lowest level and thereby fosters judicial economy. Without judicial restraint, a court would be free to reverse a legal and reasonable decision of the Board just because a given judge did not agree with the decision. Unsuccessful petitioners would thus

be motivated to seek a sympathetic judge and increase further hearings, not on error, but on the second bite theory. Alternatively, strategies of less than full disclosure in the administrative hearing could be indulged in, knowing that an excessive or unreasonable request could be modified at the following judicial hearing. Neither of these tactics is worthy of encouragement.

The necessity and importance of what judicial restraint means in reviewing zoning board decisions is explained in Yockley, Zoning Law and Practice, 2nd Edition, Volume 1 at p. 479 quoted in the Colorado case of Levy v. Board of Adjustment of Arapahoe County, 141 Colo. 493, 369 P.2d 991 (1962). It noted:

> "It is a well settled proposition of zoning law that a court will not substitute its judgment for the judgment of the board. The court may not feel that the decision of the board was the best that could have been rendered under the circumstances. It may thoroughly disagree with the reasoning by which the board reached its decision. It may feel that the decision of the board was a substandard piece of logic and thinking. Nonetheless, the court will not set aside the board's review of the matter just to inject its own ideas into the picture of things." Id. at p. 994.

The lower court, being an experienced jurist, well knew this principle and properly declined to appoint himself to the City's Board of Adjustment. In so doing, the court properly exercised the requisite and appropriate self-restraint required in appellate review and this Court should affirm.

F. NO ASSUMPTION CAN BE MADE OR INFERRED AS TO WHETHER THE SUBSTITUTION OF THE COURT'S

JUDGMENT WOULD CHANGE ITS AFFIRMATION OF THE BOARD'S DECISION.

There is nothing except conjecture to assume the lower court would reverse its ruling if it had ignored judicial restraint and substituted its judgment for the reasonable act of the Board. The inference from a minute entry allowing the injunctive relief to continue pending appeal (R 98) is unjustified. The Court clarified in its order by interlineation that a stay was conditioned upon complying with existing statutory and procedural rules. (R 119).

The Board could more justifiably point to bench rulings and the clarification on the stay, and most importantly its finding of reasonability, to assert the court if it substituted its judgment, would affirm the decision. It is more credible, but is speculation without the proposed findings.

If the existing law of appellate review is judicially reversed, and if the support is not clear as a matter of law, no inference can be supported that the judge would do anything except affirm its decision as this Court should do.

POINT II

THE COURT PROPERLY HELD THE BOARD'S DECISION WAS VALID BEING NEITHER AND NOT ILLEGAL NOR IMPROPER DESPITE ALLEGATIONS OF IRREGULARITIES AND WAS SUPPORTED BY THE EVIDENCE.

The Jorgensens objected to the lower court making any Findings of Fact to advise this Court what it considered significant in reaching a decision that the Board of Adjustment's

decision was proper; thus, they have little standing to now speculate on what the lower court would have done if the policy decision were the Court's to make. Farrell V. Turner, 25 U.2d. 351, 482 P.2d 117 (1971). However, for the Court's convenience, in response to errors cited at p. 15 of appellants' Brief, we draw its attention to the following:

1. Appellant-Jorgensens allegation of creating adverse neighborhood reaction by the notice's clerical error in Case 8891 (describing the use as a "registered home preschool "as opposed to "registered home day care") is without merit. The unrebutted facts unequivocally show the neighbors involved knew what Mrs.Jorgensen was doing, regardless of its name. Further, people in attendance March 22, 1982 were informed of the error at the beginning of the hearing, so that there was no confusion on anyone's part, including the Board's. In addition, a careful reading of the letters submitted by neighbors not attending the hearing, shows their objections were based, not on a particular activity, but on a philosophical opposition to what they considered the negative impact of a business operating in their Neighborhood. They considered any commercial business an unwelcome and threatening encroachment of the peaceful enjoyment of their homes and environment. See, App. B, #44, 42 and footnotes, and expanded factual background in Exhibit, D-2.

The clerical error did not create the adverse reaction; it already existed. The error was immediately corrected, no harm

occurred and no one acted in confusion. Jorgensens claim of prejudicial error is meritless and unsupported in the record.

2. The alleged error in failure to inspect the interior of Jorgensens' home is without factual foundation. The record reveals that at least three of the five members of the Board had been by the Jorgensen property and were familiar with the Neighborhood in which it was located. (R 57) Further, the Court personally acknowledged his personal knowledge of that neighborhood from the bench.

Jorgensens' allegation demonstrates that they did not understand the Board's duty was not to determine if they were complying with DFS regulations governing care; rather, it was to ensure that the use was a compatible use within the setting of its immediate surrounding Neighborhood. DFS and the Health Department had a different function of inspecting and controling the interior condition and operation of the business; they had no jurisdiction over the zoning issues.

3. The alleged error of assuming the Neighborhood was predominantly composed of elderly neighborhood is contrary to the evidence. This argument is ludicrous because it requires this Court, the lower court and the Board to blindfold their eyes to the appearance of the ten individuals that had appeared before the Board in the various hearings or the ability to do simple arithmatic in reading written responses made from people living in a place for over 22 years. (Exhibits P-1 and D-2).

Jorgensens did not contest the truth of this analysis of the Neighborhood - as used within the significant 85' parameter. They only say it is not supported by the express statements in the part of the record to which they wanted to limit the lower court. They did not proffer or bring in one piece of evidence to prove that the existence of other preschoolers in that immediate Neighborhood, or that at least 5 of 8 parcel owners are not retired and the remainder (1) either have no children, or (2) have older children.

4. Appellant-Jorgensens' alleged error that the Board believed that a permit must be denied if there was any neighborhood opposition, is simply an erroneous characterization of the record. First, the Board Findings show the Board clearly had before it the ordinance itself with the operative language. (R 22). It was filed in Case 8891. Ex. P-1. Further, the Board had received instruction from both appellant and City counsel. (R 22-23). In addition, the Board had been directly involved and knew of the change requiring the creation of a public forum. It had independent knowledge of the legislative intent. (R 16-23, 74-76, Ex. D-2).

Mr. Jorgensen's comment suggesting the contrary appears to be a quote; however, in fact, it is not taken from a verbatim transcript. The explanation of the context of the statement was made by the Board's staff, as set forth in the affidavit of Mr. Mark Hafey. (R 76). If appellant-Jorgensen was concerned with

presenting the verbatim record, it could have required the tape to be transcribed.[15] The alleged tainting impact of one isolated statement in a lengthy proceeding spanning two meetings was properly ruled by the lower court not to be determinative and not proved correct by appellant-Jorgensen.

5. Appellant-Jorgensens' alleged error that the Board based its finding of a nuisance solely on the fact opposition appeared is untrue. Evidence before the Board included: (a) a near tragic incident resulting from rambunctious but unsuspecting preschoolers under the Jorgensens' care who were outside the premises, requiring frightened and concerned neighbors to practice extraordinary caution; (b) inconvenience and conflict between Jorgensens' patrons and adjoining property owners because these patrons failed to respect the need to keep private driveways clear; and (c) narrow streets; (d) the location of the Jorgensens' home which is on a winding portion of a street; (e) lack of off street parking for two families and the extra traffic burden of the business which generated 6-10 traffic trips for the children; (f) the home used as a duplex by two families, had a density and intensity of use not common in the particular surrounding Neighborhood. Inherently, the use generated twice the average demands and level of activity even without the

[15] The tape is not considered the official record but is held and maintained 90 days to allow its availability to supplement the official record if necessary. (R 76).

business use of a day care center; and (q) evidence of annoying dog barking caused by the childrens' activities. See App. B #11, 33, 34, 41, 42.

6. Appellants' argument that the Board erred in considering the unique demographics features of the Neighborhood, composed of many elderly people and suggesting they are not "ordinary" or of average age, demonstrates the Jorgensens' failure to understand the legislative charge to determine compatibility of uses. The criteria required that the conditional uses "not change the character of the home or neighborhood" (§51-6-14(2)(a)(b), App. D, R 34); as such, the Board had the duty to determine the Neighborhood's characteristics.

Additionally there has been nothing proven by appellants to show that the annoyances complained of and objections raised by these neighbors were anything but a normal and ordinary reaction to burdens imposed by artificially importing a day care business into a residential neighborhood. There is nothing to show all of these respected residents were not people of normal and ordinary sensitivity.

7. Appellants' allegation that there was a lack of evidence to support the Board's evaluation of the operation or activities of the day care business is meritless. See facts in paragraph 5, above.

It is true that all of the testimony offered by neighbors may not have been relevant to the issue before the Board, but the

Board is an administrative fact-finder. Like a court, it must sift and weigh the evidence and discard the chaffe. This was in fact done as evidenced by Board member Lewis' statement that there had been testimony missing the issue. (R 61). It demonstrates Board members are skilled in discarding the irrelevant and using the germane factors. Interestingly, it was Mr. Lewis that moved to deny the permit on April 5, 1982. (R 64).

8. The allegation of error caused by two board members voting at the final meeting who did not attend the earlier public hearing on March 22, 1982 fails to consider: (1) that the minutes of March 22nd had been distributed and were as agenda items for approval; thus, the evidence was within their knowledge; (2) Mr. Lewis moved, Mr. Callister seconded and the vote was 5 to 0 (R 64); thus, even with the exclusion of the votes by Mr. Kelly and Mr. Dunn would not change the result. There is no evidence to suggest that the result would have been different if only the 3 members present had voted on the issue and the two other members had excused themselves, as Jorgensens suggest was required.

9. The alleged failure to notify Mrs. Jorgensen of the April 5th meeting is not accurate and is contrary to the evidence. The minutes specifically note that at the beginning of the March 22, 1982 meeting the Board chairman explained the Board's procedure. He explained that after the advertised hearings were completed, the Board would proceed with

deliberation on the agenda items. He specifically informed all those present that all discussions would be open and they could stay and listen. People are informed if they do not choose to stay, they can call and find out what happened, before written Findings are mailed two weeks later. (R 57, App. B #38).

Further, on March 22, 1982, after its deliberations, the Board specifically voted to hold Case 8891 for two weeks (the date of its next meeting) for the opportunity to involve the entire Board. (R 22, 55). Having continued deliberations to a date certain in an open meeting, even courts would not have renoticed parties.

On April 5, 1982, Case 8891 was not discussed as a public hearing agenda item, but was on the latter deliberation agenda i an open meeting. The minutes clearly show no new testimony from interested parties was taken. Staff reviewed the background and testimony from the "earlier hearing" held March 22 and the criteria of the ordinance. (R 63-64).

Mrs. Jorgensen and her counsel could have attended if they had so chosen. They attended similar continued deliberations in Case 8457 (R 18). There is no evidence that Jorgensens did not have actual notice; absent meeting that burden of proof, this Court should presume they had the notice they should have obtained by staying and personally knowing of the decision. Alternatively they are estopped from denying notice because they could have obtained it by following instructions offered by the

Board to contact it. Mrs. Jorgensen's non-appearance at the April 5th meeting was a self-imposed action over which she had complete control.

Lastly, Mrs. Jorgensen's failure to appear was of no prejudicial harm because no hearing occurred. The only thing continued were the Board's deliberations. These were done in an open and public meeting; however, the Board received no new testimony from interested parties and the deliberations were confined to the Board and its staff (R 63-4). No violations of due process occurred.

10. Appellant's argument that the Board was required to impose conditions to make the incompatible day care business less incompatible with this Neighborhood misconstrues the purpose of the City ordinance. The ordinance's provisions set the criteria and establish the forum for Neighborhoods to express their positions. It is not the Board's legal duty to find a way to inject this business into this Neighborhood.

Further, it is significant to note that the denial of a permit was not a complete bar to use of Jorgensens' home to generate income. Appellants were still permitted a use of more limited intensity. They could have a "home occupation" use if limited to two children.

Plaintiffs' allegations of prejudicial harm or error was made to the lower court. After conducting its full and complete review of the evidence before the Board, discussed above the

Court found the record sustained the Board's action. (R 118). Its decision was a proper analysis and should be affirmed.[16]

VII.

CONCLUSION

The trial court, in considering the Board's decision challenged in this case, applied the correct principles of law and conducted a plenary and thorough judicial scrutiny of that decision. It fully reviewed the record and evidence of the administrative Board and properly ruled that it acted lawfully within its delegated authority. Further its decision was supported by the evidence before it and was not arbitrary, capricious nor unreasonable. The record clearly supports the decision of the trial court, and the lower court should be affirmed.

Appellant-Jorgensens' argument that the Court should become the super Board of Adjustment is not supported by any relevant authority; further, it is contrary to the sound administration of justice and the principle of separation of powers. Appellants' theory would unwisely require this Court to reverse the cases of

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[16] "The responsibility of this court to review the evidence in equity cases, it will not disturb the findings of facts made below unless they appear to be clearly erroneous and against the weight of the evidence. In conducting our review of the evidence, we are of course, mindful of the advantageous position of the trial judge who sees and hears the witnesses, and we are constrained to give due deference to the decisions by reasons thereof." McBride v. McBride, 581 P.2d 996 (Utah, 1978) (Emphasis added).

Stonewood Heights, Peatross and Crestview, and would create law contrary to that recognized throughout the country.

The existing appellate standard of review properly applied by the lower court adequately allows the Court to make a full, complete and meaningful review and determination of whether or not an administrative act is legal and reasonably related to credible evidence. Thus, it protects aggrieved parties from irresponsible abuse of discretion.

The lower court correctly performed its duty of review. The appellant-Jorgensens failed to meet their burden of proof to overcome the validity of this specialized administrative hearing Board. Therefore the lower court's decision should be affirmed.

DATED this _____ day of November, 1983.

ROGER F. CUTLER
Salt Lake City Attorney

JUDY F. LEVER
Assistant City Attorney
Attorneys for Defendants-
Respondents

APPENDIX EXHIBIT A

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IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR

SALT LAKE COUNTY, STATE OF UTAH

---oooOooo---

DIANE M. JORGENSEN and CRAIG M. JORGENSEN, Plaintiffs, vs. SALT LAKE CITY CORPORATION, a body corporate and politic under the laws of the State of Utah, and THE BOARD OF ADJUSTMENT OF SALT LAKE CITY, Defendants.	ORDER AND JUDGMENT Civil No. C 82-4134

---oooOooo---

This matter came on for hearing before the Court on the 2nd day of December, 1982 before the Honorable Ernest F. Baldwin, District Judge. The plaintiffs were represented by Michael R. Murphy of Jones, Waldo, Holbrook & McDonough and the defendants by Judy F. Lever, Assistant City Attorney.

The Court preliminarily ruled that the statutory basis for plaintiffs' claims, Section 10-9-15, U.C.A. (1953), providing a person aggrieved by the action of a municipal board of adjustment with a plenary action for review, does not contemplate, allow or necessitate a trial de novo.

The Court received with no objection the record before the Board of Adjustment for Salt Lake City in Case No. 8891 (1982). The Court received over the objection of plaintiffs the record before the Board of Adjustment for Salt Lake City in Case No. 8457 (1980). The Court then proceeded to hear the argument of counsel and took the matter under advisement. Now, having considered the argument of counsel and having reviewed the entire record the Court is of the opinion that its role pursuant to Section 10-9-15, U.C.A. (1953) is circumscribed and limited to the scope of review traditionally employed by a court of appellate jurisdiction. It is therefore the ruling of this Court that the decision of the Board of Adjustment is entitled to a presumption of validity, that there is some evidence in the record to support the decision of the Board, that to reverse the decision of the Board would be to substitute this Court's judgment for that of the Board which would be inappropriate under Section 10-9-15, U.C.A. (1953), and that the decision of the Board was not arbitrary or capricious.

Counsel for all parties appeared before the Court on the 6th day of May, 1983, to argue and consider the proper form and extent of order and judgment in this case and following said argument the Court deems the form of order and judgment suggested by plaintiffs to be appropriate.

WHEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that the decision of the Board of Adjustment in Case No. 8891 is affirmed and upheld, that plaintiffs' Complaint is dismissed with prejudice, ~~all parties bearing their own costs~~, that this ORDER AND JUDGMENT and appropriate action thereunder by defendants be stayed pending expiration of the statutory appeal period and, if an appeal hereof is timely pursued by either plaintiff said stay shall continue during pendency of the appeal upon filing the appeal bond. Staying & rule

DATED this 6 day of May, 1983.

BY THE COURT:

Ernest F. Baldwin
District Judge

ATTEST:
H. DIXON HINDLEY
Clerk

By _____ Deputy Clerk

APPENDIX EXHIBIT B

DETAILED STATEMENT OF FACTS

Respondent agrees that in order to consider the issues raised on appeal this Court must have the background information given to the lower court that was before the Board, including the additional statute and ordinance framework in which the dispute arose and was resolved by the Board and lower court.

A. Legislative Framework regarding Day Care providers.

1. In 1943, the legislature of the State of Utah recognized that providing child care for minor children was a business activity which required licensing and regulation. To that end, Chapter 16 of the Laws of Utah of 1943 was passed enacting what is now found at Sections 55-9-1 et seq. Utah Code Annotated, 1953 as amended.

Said chapter provides general regulatory and administrative rulemaking power to state agencies, imposes penalties and sanctions for violations and requires licensing when care is being provided for three or more minor children in lieu of care and supervision ordinarily provided by parents in their own homes for periods of more than 4 but less than 24 hours in any one day. R16. Said rules are currently administered by the Division of Family Services, "DFS".[17] An excerpt of Section 55-9-1, Utah Code Annotated is attached as Appendix Ex. C.

2. Subsequently, the City enacted Chapter 13 of Title 18 of the Revised Ordinances of Salt Lake City, Utah 1964 as amended establishing complimentary standards related to general health and sanitation conditions under the supervision of the Health Department for such care providers which applied, whether children were cared for 4+ hours as a "day care center" or under 4 hours/day as a "preschool" or "hourly day care center." R16, 31.

3. Prior to passage of Bill 78 of 1981, group child day was

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[17] Under the power of Section 55-9-1, et seq. U.C.A., DFS has promulgated administrative rules explicitly creating two types of care facilities: (1) Family Day Care for small groups of 6 or less in a provider's home where her preschoolers count, and (2) Child Care Centers for groups of 7+. R16, 17. Implicitly two additional types remain: (3) all preschools, nurseries, etc. where a child stays 4 hours or less per day, and (4) care for not more than 2 children. R16-18, 73.

authorized by City zoning ordinances as permitted uses in a Neighborhood Business "B-3" district, and was available as a conditional use with other commercial-residential businesses in the Residential"R-6" mixed use district. The "R-6" conditional use permit required Board approval after favorable findings on general criteria laid out in Section 51-18-7, Revised Ordinances of Salt Lake City, Utah as amended were satisfied. R16, 26, and 74.

4. In more restricted residential zones, "R-1" through "R-3" commercial activity is generally prohibited to protect residential areas as sanctuaries for family life and well being. R16, 26, 74, 78. The predominant zoning in Salt Lake City's residential districts comprised of low density single and/or two family dwellings is the Residential "R-2" district. See Appendix A, Jorgensens' Brief.

5. Restricted residential districts such as the "R-2" zone, do not authorize the operation of commercial activities from a home unless the business is of such an incidental nature that it can qualify as a home occupation accessory use. R16, 74-75.

6. Home occupations had been defined by the City in Section 51-2-34 of the Revised Ordinances of Salt Lake City, Utah. R-34. However Jorgensens elected to only cite a portion while omitting unfavorable language therein. The complete or plenary definition is attached as Appendix Ex. E. The legislative format shows the ordinance with 1981 admending language in underlining. See also Ex. P-1, R33.

7. The language omitted clearly reflects an underpinning principle that while the accessory use may unconspicuously accommodate a resident's productivity and talent, group activities and instruction were specifically precluded because they attract groups of people to invade a neighborhood with attendant increases of traffic trips, parking demand, activity, etc. Individuals may tutor or teach music lessons, etc. to individuals from home, but group teaching is prohibited. R16-34. Group instruction was not a permitted use for day care, music, dance or charm schools, etc. until the "B-3" zone. R26, 76.

8. At least two other cases involving the zoning issues of child care facilities preceeded Case No. 8457 before the Board. Those cases dealt with preschools desiring either to be granted an "R-6" conditional use approval or approval in "R-2" districts as public schools, as opposed to commercial specialty schools required to be located in the "B-3" district. The Board had requested comprehensive revision. R18, 29, 75; Ex. D-2

9. DFS left the responsibility of getting approval from local authorities for business licenses, zoning, building, fire or health code requirements up to its licensees. R-18 Findings of Case No. 8457, Def. Ex. 2, R20-22, 59-61, Findings Case No. 8991, Pl. Ex. 1.

B. Origination of the Initial Controversy.

10. Jorgensen's reside in Salt Lake City, Utah at 1398 Michigan Avenue. This is an established low density residential neighborhood where the homes appear to be single dwellings although duplexes are allowed in the zoned Residential "R-2". R16-18, 20-21, 58-61, 63-64, 122.

11. Jorgensen's home is a duplex which was occupied at the relevant time, at least in 1982 by two families. R21, 60.

12. Mrs. Jorgensen began the business of providing care for other children in her home for pay on a regular basis in 1978. R-16, Finding of Case No. 8457, Def. Ex. 2.

13. Contrary to plaintiff's statement on the number of children being tended, the original application statement indicated that approximately 10 chi'dren were regularly being cared for although it averaged between 3-6 on individual days. These children were in addition to her own preschooler plus 2 children of school age. Additional children were tended on an infrequent basis. Affidavit of Diane Jorgensen, "Jorgensen Aff." Exhibit D-2, R-11.

14. During early 1978 through December 1981, Mrs. Jorgensen operated her business: without a license or approval from DFS; without a permit from the Health Department; and without a business license or any other form of review or approval by the City. This is true notwithstanding the fact the approvals were required by then existing ordinances and law. R17, 66, 74, Jorgensen Aff. Ex. D-2.

15. The City had no knowledge of Jorgensen's business until 1980 when the next door neighbors complained about conduct and inquired of the legality of the day care business. R12, Jorgensen Aff., Ex. D-2, and R74, 75.

16. The City investigated the complaint in its normal process of zoning enforcement. It verified she was operating an unauthorized use in the "R-2" district and issued an appropriate notice. R12, 16, 74-75, letter of October 2, 1980 of Ex. D-2.

17. Jorgensens appealed this staff ruling to the Board, contesting the use was allowed in the "R-2" district under the

home occupation exemption. Notice of Zoning Appeal, Jorgensen Aff. of Ex. D-2.

18. The Jorgensens' request for an interpretation, known as [illegible] 8457, was originally heard as a public hearing agenda item [illegible] the Board on 10/14/80. Jorgensens' contested it was not a [illegible]ildren's day care center but a qualified home occupation in the "R-2" zone. R16, Case 8457 Findings, Ex. D-2.

19. Counsel entered his appearance and Jorgensens with counsel were present at the hearing. Entry, Ex. D-2, Case 8457 Findings, R16-19. In addition 12 other residents of that neighborhood attended and presented the Board a statement opposing the Jorgensens' position that bore 27 names of residents/owners. Ex. D-2. This group included property owners of at least 8 parcels residing on Michigan Avenue within one-half block of Jorgensens' home and 2 representatives of a church abutting Jorgensens' rear yeard. R16-19, Ex. D-2.

20. Obviously, the record does not specify the age of these individuals but reflects the Board saw them and heard their definite opinion that a strict construction should occur precluding encroachment of businesses into their neighborhood. R-16-19, contents of Case 8457 Ex. D-2. If their age had been specified, it is uncontested that 10 of the 12 residents present were or are of near retirement age or older. The two excepted were the church representatives, who did not live on Michigan Avenue. R16, Case 8457, Ex. D-2.

21. At that hearing, the record reflects several neighbors voicing heated objections for a variety of reasons (including nuisance and concerns of safety, traffic, noise and zoning policy) to the Board making an interpretation which would legalize Jorgensens' business as a home occupation in their neighborhood. R16-19, Ex. D-2.[18]

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[18]Judge Faux, a next door neighbor, described conditions and/or incidents relating to the businesses' operation and testified of confrontations with a parent who parked blocking Faux's driveway. He was concerned about safety because of close proximity of his driveway, sidewalks, traffic, and lack of off-street area for playing and for the transportation of children by parents.

Mr. Thompson voiced concerns about the traffic and noise being generated.

Mrs. Barker, and Roger Van Frank in written form, expressed (footnote continued)

22. On 10/14/80 the Board concluded the hearing. Later that night in deliberations it held it over and requested a legal opinion which was given orally at its deliberations at the next meeting on 10/27/80. The Board was informed of the pending draft proposal of a liberalizing ordinance revision addressing child care facilities. It attempts to dovetail into DFS classifications as conditional uses into their existing zoning and health ordinances regulating childcare. R16-78.

23. Contrary to statements in Jorgensens' brief, the record shows their counsel attended both Board meetings including deliberations on 10/27/80. Jorgensens and their counsel exercised their opportunity to present their supporting testimony and evidence to the Board and confront opposing witnesses and respond to their testimony during the public hearing. Similarly Jorgensens' exercised their right to observe the Boards' deliberations continued to 10/27/80 and commented during the Board's discussion. R18, Ex. D-2.

24. Lacking power to adopt legislation according to its duty to interpret existing ordinances, the Board ruled Jorgensens' business did not qualify under the home occupation definition thus violating zoning which it ordered to be corrected in 30 days. R18. The written Findings and Order of Case 8457 was filed 11/10/80 and a copy thereof mailed to Jorgensens. R18, Ex. D-2.

C. First Lawsuit and Ordinance Revision.

25. Challenging the Board's ruling in Case 8457, Jorgensens initiated litigation in the Third District Court seeking declaratory and injunctive relief from the Court. R10-23.[19]

26. Jorgensens obtained a preliminary injunction allowing Mrs. Jorgensen to continue her business. However the injunction was granted only after Mrs. Jorgensen agreed and was required to obtain DFS licensing (requiring a reduction of the number of children cared for to a maximum of six children, including the provider's own children) and to otherwise comply with the terms of the proposed ordinance draft. R20, 21, 59, 33, 36 and Ex. D-2.

27. The proposed ordinance draft, as it applied to family

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support of the zoning policy to protect residential areas from commercial encroachment changing the character and quality of their neighborhood.

[19] Jorgensen v. Salt Lake City Corp., Case No. 80- 9531.

day care proposed that such businesses or "Licensed Babysitters" could be conditionally approved by zoning staff as a conditional use provided they were DFS licensed and agreed to comply with certain local requirements. No hearing was required unless there were allegations raised by complaints of violations. Then the Board could review the matter after a hearing. Page 3, Section 51(2) proposed draft, Defendant's Exhibit D-2.

28. The legislative consideration of the child care ordinance revision was drawn out due to heated controversy raised by affected special interests groups with competing interests.[20] The City Council ultimately modified the revisions to require "registered home day care" providers to seek a conditional use permit in order to operate their regulated business in their homes. Each request must be considered individually by the Board after a noticed public hearing, unless the applicant submitted the written consent from all property owners within a 85' perimeter of the property herein referred to as "Neighborhood."[21] R33-34, 76.

29. Said Bill No. 78 of 1981 was passed 10/29/81 becoming effective on 11/1/81 upon its publication. R33-36. A copy is attaached as Appendix Ex. D as the new ordinance.

30. The Bill was a dramatic but not unqualified liberalization. The Council intentionally took one step back from the proposed draft to ensure each conditional use was either supported in writing by its Neighborhood or was submitted to individual review by the Board where a forum was provided for neighborhood response or input.[22] R20-23, 33-36, 58-64, 75-76. The preamble recognizes benefits of child care conducted in their neighborhoods can be compatible in residential zones but notes potential adverse impact from the incompatible increased demands for parking, traffic, play associated with care facilities, etc. R-33.

31. After passage, the parties stipulated to dismiss the First Lawsuit with prejudice. Mrs. Jorgensen agreed without

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[20] Special interest groups include neighborhood protection advocates, large scale commercial preschool/day care versus family day care providers. R29.

[21] Section 51-6-14(2) Revised Ordinances of Salt Lake City, Utah, 1965 as amended as adopted in Bill 78 of 1981. App. Ex.4.

[22] Section 51-6-14 (20(a)+(b), Revised Ordinances of Salt Lake City, 1965 as amended. Id. App. Ex. D.

saving rights to future judicial review, to apply under the provisions of the new ordinance. R-4, 20, 59 and Case 8891, Ex. P-1.

32. The Board and its staff were aware the modifications in the final Bill were more restrictive than the original proposal as described in paragraph 27, R16, 25-26, 33-36, and 58-61. The Board understood its charge to consider whether or not each application satisfied the required criteria of the ordinance language and spirit. R-20-23, 29-31, 59-64, 74-76.

D. Second Board Case

33. On 3/5/82, Mrs. Jorgensen submitted her application for a conditional use permit to operate a family day care business for 5 children in her home. It was known as Case 8891. The ordinance designates this use as "registered home day care." Application, Ex. P-1.

34. Mrs. Jorgensen represented she then provided services for 8 different children. Four children stayed whole days, four came for portions of the day but with a few exceptions the combination averaged 5 each day in addition to her own children. (Application attachment, Ex. P-1.

35. Mrs. Jorgensen identified, as required the 9 parcels and property owners within the an 85' parameter of her property, herein referred to as "Neighborhood." Ex. P-1.

36. Case 8891 was scheduled for a public hearing on the Board's agenda of 3/22/82. Notice was mailed to neighbors in the 85' parameter hereinafter "Neighborhood". Ex. P-1.

37. By a clerical error said notice described the request as a conditional use to operate in an "R-2" district a registered home "preschool center" as opposed to "day care". Notice, Ex. P-1.

38. On 3/22/82, 3 of 5 Board members or a quorum was present, including Louis H. Callister, Jr. acting as Chairman, Linda Wilcox and Robert Lewis. The Chairman advised applicants of general procedure: (1) each property had been viewed by Board Members; (2) the public hearings would be conducted then the Board would deliberate on its actions; (3) people not deciding to stay for deliberation may call to learn the decision or ruling, R57.[23]

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[23] Written findings cannot be approved until after the Board (footnote continued)

39. In the staff introduction to the hearing on Case 8891, Case 8457 and the prior background was capsulized for the Board, as was legislative history of the new ordinance's adoption. The provisions of the new Bill applicable to the Board's consideration on Registered Home Day Care and the criteria was examined (R-20-23, 59-61) and a copy filed in the Case 8891. R33-36, App. Ex. D.

40. Mrs. Jorgensen appeared with counsel, who made the presentation to the Board. Mr. Murphy additionally detailed the status of the First Lawsuit, the interim act of obtaining an injunction and DFS licensing for Family Day Care, and his client's ability to comply with the criteria specified in the new ordinance. R20-23, 58-64 Ex. P-1.

41. The hearing was opened to the public. Of the nine parcels in the "Neighborhood" 3 were represented by 4 individuals. Two other parcel owners submitted written statements. R21-23, 57-61. All vociferously objected to the Board granting Mrs. Jorgensen the privilege to continue operating her business in their Neighborhood for a variety of reasons, including some that were very emotional. R-76. No resident/owner of the Neighborhood supporting Jorgensens, if any existed, appeared. Mrs. Hayes, an employer of Mrs. Jorgensen's services urged the Board to approve the use. Mrs. Jorgensen or her attorney enjoyed and exercised opportunity in the hearing to confront and respond to Neighborhood complaints. R20-23, 59-6., Ex. P-1.

42. While certain complaints raised by one neighbor may be susceptible to a characterization reflecting conflict between neighbors rather than finely focused on the criteria, the Board received important information relevant to its decision on the criteria. Such relevant information related among other things to: (a) identifying the unique character of the Neighborhood; (b) Neighborhood attitudes in perceiving Registered Day Care as an incompatible use; (c) traffic and safety; (d) burden in Neighborhood to analyze change; (d) experience in operation.[24]

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approves its minutes two weeks later at the next meeting.

[24]Such information coming from Neighborhood testimony included:

(a) The Board's identification of the age, demographic makeup, attitudes, toleration of the surrounding neighbors bearing the greatest impact of the businesses' operation. This Neighborhood was highly concentrated with people of advanced years, without children, let alone preschoolers. Neighbors considered the concentration of importing preschoolers with their attendant (footnote continued)

43. In deliberation after the hearing on 3/22/83, Board members noted some testimony had not been focused on the applicable criteria (Mr. Lewis comments R-22, 5). Realizing its decision would be controversial in either event and to dissipate heated emotions, in open meeting, the Board voted to hold the matter for two weeks to 4/5/82 for discussion by the full Board. R22, 76.

44. On 4/5/82 the Board with all 5 members including Mr. Dunn and Kelly again deliberated on the matter, (R62). Each member had benefit of proposed minutes of 3/22/82. No witnesses testified. Staff Mr. Vernon Jorgensen, rehighlighted the history of cases 8457 and 8891. The Board's counsel again directed its attention to the criteria of the new Bill 38 of 1981. R22-23, 55, 57, 61-2, 64, 75 and 76.

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noise, energy, play patterns, etc. as an undesirable change. R-57-60.

(b) Neighbors perceived Jorgensens' business a commercial enterprise for Jorgensens' gain at the Neigborhood's expense. Their expense was continued loss of their right to a private, protected noncommercial residential area in which they had invested decades of their lives, energy and resources. The business was perceived as being incompatible, imposing burdens of more intensive use. The changes were perceived as: downgrading their quiet Neighborhood, not being artificially caused they were not required to tolerate or accommodate the changes. R22, 23, 59-60, Stocking and Thompson letters Ex. P-1.

(c) Jorgensens' home was a wedge shaped parcel with narrow frontage on Michigan Avenue. Here the street is on a slope and winds. There is not appropriate space for the increased need for offstreet parking for delivery, and neighbor's driveways can be easily blocked by parking near the sidewalk. (Field trip, Illustration and photograph of Ex. P-1, Illustration).

(d) Changes increasing density and intensity of use. In a Neighborhood used primarily for single families, the Jorgensens' home, being used by two families (R21, 57) already generated twice the average demands for parking, traffic, outdoor recreation area, etc. The proposed use for traffic alone could add 10-14 daily extra traffic trips just for child transportation (assuming two trips per child per day).

(e) Actual operation generated complaints of annoying noise from general activity and Jorgensens' dog's unusual barking when children cried. R24. The annoyances was not speculative but real reaction to actual continuing problem.

45. Based on the information received at the earlier hearing of 3/22/82, and its knowledge of the property and neighborhood, the Board collectively concluded the proposed use did not meet the criteria and therefore unanimously 5/0 denied the conditional use , noting Jorgensens could still care for a smaller groups - not to exceed two. R22-3, 64.

46. All items including Case 8891, considered in the open meeting of April 5 were noticed as required by law on that date Case 8891 was considered in the deliberation portion of the meeting. Inasmuch as deliberations on Case 8891 had been expressly continued and calendared on 3/22/82 to 4/5/82 any and all interested parties present on 3/22/82 either knew of the date, or left before the decision was made and failed to inquire as instructed.

47. The Board's action was reduced to writing in Findings (R-16-23) and officially filed on or about 4/19/82.[25]

E. Second Lawsuit

48. On 5/19/82, Jorgensens filed their Complaint and Petition for Relief from the Board's decision in Case No. 8891. R2-23.

49. In the dismissal of the First Lawsuit,[26] Mrs. Jorgensen agreed to comply with the Board's decision in the Second Case until and unless she could secure a judicial stay. R21. Mrs. Jorgensen states she reduced her care to two children the first week of June 1982. R66-67.

50. On 8/16/82 Jorgensens secured a preliminary injunction

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[25]The related portion of the Board's actual minutes of 3/22/82 and 4/5/82 were before the Court at R57-64 together with the Findings and Order which are prepared by extracting and collecting minute excerpts for each case. R16-23. Minutes as the official record are prepared from a verbatim tape. The tape is to assist in preparation of minutes and generally is not transcribed and is destroyed after 90 days. R76. Findings are prepared and are signed only after the minutes of the final meeting are approved which occurred concurrently in this case on 4/19/82. The documents before the Board together with any statements, etc. are retained in the Board's file which is known as the case. The certified contents of cases 8891 and 8457 were respectively by the Court in Exhibits P-1 and D-2.

[26]Detailed Statement of Fact No. 26.

to authorize the continuation of day care for 5 preschoolers until 1/2/83. An expedited trial setting was approved as was leave to request an extension if final judgment were not entered by said date. R87-88.

51. The Board filed a Motion in Limini to be heard prior to trial on 12/2/82 for the Court to determine: its scope of review, the type of trial or review it would conduct, the type of evidence to be received; and Jorgensens' burden of proof to ultimately focus the issue before the Court.

52. The Court from the bench did not rule on each issue on the motion, but did rule prior to trial:

(1) That it did not intend to set aside the Board's ruling unless it found it to be arbitrary and capricious being unsupported by the evidence before the Board or illegal.

(2) That it would not conduct an evidentiary trial de novo and would confine itself to issues, evidence and information before the Board when it made its ruling. Evidence, information or testimony not before the Board would not be received.

53. Based on those rulings and taking the rest under advisement the matter proceeded to trial. Both parties had witnesses available. Inquiring as to whether the Court had before it all of the record and information before the Board, the Board's counsel informed the Court it had a portion of the record in the form of the Findings and Minutes (R53-64) and documents in the file but that the rest was available and intended to be introduce as exhibits. The Court indicated it wanted the entire record and information before the Board in order to conduct its analysis.

54. Plaintiff then had the certified contents of Case No. 8891 marked as its Exhibit P-1. The Board offered the additional certified contents of Case No. 8457 on the basis that it was necessary background information: (1) Obviously within the Board's knowledge; (2) Before the Board and expressly discussed by the Board and plaintiff at the time it made its decision in Case 8891; (3) Placed before the Court as necessary information in Jorgensen's Complaint; and (4) To deny its admission would prevent the Court from making a complete review of the Board's action.

55. The Court also received illustrative Exhibits D-3 (subdivision plat) and an illustration where an aerial photograph overlaid with property lines reflected the actual development of

street and property configurations in the Neighborhood. Exhibit D-3.

56. During argument the Court made a finding from the bench that he considered the activities of operating small group child care as a business as opposed to the noncommercial characterization painted by Jorgensens.

57. After extensive argument where counsel for each side was given wide latitude to argue from the issues and information before the Board, the Court took the matter under advisement. R96.

58. The Court ruled in a minute entry of 12/7/82 in favor of the Board finding no cause of action. R98.

59. Proposed Findings of Facts, Conclusions of Law and a proposed Order were prepared and submitted with detailed findings to demonstrate to a reviewing court, if appealed, the portion of the record argued to the Court upon which the Court relied in affirming the Board's decision. R121-133.

60. Jorgensens filed Objections (R112-114) and a subsequent proposed combined Order and Judgment. R117-119. Primarily the Objection contests not to the truth of matters therein nor that the matters were not argued to the Court, but on matters of law and form . It submitted that inasmuch as the Court did not conduct an evidentiary trial de novo, nor feel it necessary to substitute its judgment, findings of the court were neither necessary or proper. Plaintiff also objected awarding the Board, as prevailing party, its costs. R-112-114.

61. The Court indicated it had found supporting evidence in reviewing the Board's action to affirm the decision. Any problems of form in the Findings could be corrected. Jorgensen's objected to any findings being made. Noting that a waiver of findings would require the Supreme Court on appeal to give greater deference to the trial court's discretion, the Court agreed to give plaintiff what it sought - a waiver of findings so it amended Jorgensens' proposed Order and Judgment by interlineation to clarify it: found adequate supporting evidence, assessed Jorgensens for the Board's costs, and required any stay to satisfy require the normal supersedeas bond procedures. R117-119.

62. The Court made no reference, implication or inference as to what it would rule if the matter had been reviewed as a matter of original jurisdiction.
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55-9-1. Day nurseries—License—Exceptions.—Except as provided herein, no day nursery, person, association, corporation, institution, or agency shall provide care and supervision for three or more children under fourteen years of age in lieu of care and supervision ordinarily provided by parents in their own homes, for periods of more than four but less than 24 hours in any one day, with or without charge, without having in full force a license issued by or under the authority of the division of family services, in accordance with rules and regulations prescribed by such board of family services. Nothing in this act shall apply to care given to children by or in the homes of parents, legal guardians, grandparents, brothers, sisters, uncles or aunts, or as part of the program of an educational institution regulated by the boards of education of the state, or as part of the program of a parochial educational institution.

History: L. 1943, ch. 16, § 1; C. 1943, Supp., 14-8a-1; L. 1969, ch. 197, § 86.

Compiler's Notes.

The 1969 amendment substituted "division of family services" for "public welfare commission" and "board of family services" for "commission."

Title of Act.

An act for the regulation and licensing of day nurseries, persons and organizations providing day care for children.

55-9-2. Visitation and inspection.—The rules and regulations prescribed by the board of family services shall incorporate or provide for standards, developed by the division of family services in co-operation with the division of health and the department of education, assuring the health, safety, welfare and education of the children, and shall provide for such visits or inspections by appropriate authorities as may be necessary to obtain compliance with the standards prescribed. Failure to comply with such standards shall be cause for revocation of the license.

History: L. 1943, ch. 16, § 2; C. 1943, Supp., 14-8a-2; L. 1969, ch. 197, § 87.

Compiler's Notes.

The 1969 amendment substituted "board of family services" for "welfare department," "division of family services" for "such department" and "the department of education" for "state departments of health and education."

55-9-3. Application for and contents of license.—The application for a license shall be in a form prescribed by the division of family services. The license shall state to whom it is issued, the particular premises where the children are to be cared for, the number of children that may be cared for at any one time, and the period during which the license will be in force and effect.

History: L. 1943, ch. 16, § 3; C. 1943, Supp., 14-8a-3; L. 1969, ch. 197, § 88.

Compiler's Notes.

The 1969 amendment substituted "division of family services" for "public welfare commission."

55-9-4. Revocation.—Licenses may be revoked for cause by or under the authority of the division of family services, in accordance with rules and regulations prescribed by the board of family services.

History: L. 1943, ch. 16, § 4; C. 1943, Supp., 14-8a-4; L. 1969, ch. 197, § 89.

Compiler's Notes.

The 1969 amendment substituted "division of family services" for "public welfare commission" and "the board of family services" for "said commission."

55-9-5. Crimes and penalties.—Any day nursery, person, association, corporation, institution, or agency violating the provisions of this act, shall be guilty of a misdemeanor.

History: L. 1943, ch. 16, § 5; C. 1943, Supp., 14-8a-5.

Effective Date.

Section 6 of Laws 1943, ch. 16 provided that the act should take effect on approval. Approved March 17, 1943.

SALT LAKE CITY ORDINANCE
No. 78 of 1981
(Child Care Facilities)

AN ORDINANCE AMENDING CHAPTER 2 OF TITLE 51 OF THE REVISED ORDINANCES OF SALT LAKE CITY, UTAH, 1965, RELATING TO ZONING DEFINITIONS BY RENUMBERING THE DEFINITION OF "DECIBEL" TO SECTION 51-2-17.5, ADDING SECTIONS 51-2-17.1, ET SEQ., RELATING TO DAY CARE FACILITIES, AND AMENDING THE DEFINITION OF HOME OCCUPATION IN SECTION 51-2-34, ADDING SECTION 51-6-14 RELATING TO A SPECIAL EXCEPTION PROVIDING FOR CHILD CARE IN RESIDENTIAL DISTRICTS; AND AMENDING SECTIONS 18-13-1 THROUGH 18-13-13, RELATING TO THE DEFINITIONS APPLICABLE TO CHILDREN'S DAY CARE CENTERS AND RELATED USES AS APPLIED UNDER HEALTH ORDINANCES.

WHEREAS, it is the desire of this Council to recognize the need for the providing of quality child care within our community, and

WHEREAS, it is the feeling of the Council that small group care in residential family homes can provide a beneficial family atmosphere within the residential neighborhoods without disrupting normal neighborhood characteristics if proper balances and safeguards are respected; and

WHEREAS, it is the desire of the Council to acknowledge the mixed use of existing community facilities that desire to provide, as accessory uses, larger scale child care or educational facilities where parking, traffic, play, etc. can be easily accommodated without disturbing the residential character of the neighborhood;

THEREFORE, be it ordained by the City Council of Salt Lake City, Utah:

SECTION 1. That Chapter 2 of Title 51 of the Revised Ordinances of Salt Lake City, Utah, 1965, as amended, relating to definitions, be, and the same is hereby amended by RENUMBERING Section 51-2-17.1 defining "Decibel" and ADDING as Sections 51-2-17.1, 51-2-17.11, 51-2-17.12, 51-2-17.13, 51-2-17.14, 51-2-17.15, 51-2-17.16 definitions for types of day care facilities; and AMENDING Section 51-2-34 defining "Home Occupation". Said amendments shall read as follows:

Sec. 51-2-16. Coverage. ***

Sec. 51-2-17.1. Day Care. Persons, associations, corporations, institutions or agencies providing on a regular basis care and supervision, (regardless of educational emphasis) to children under fourteen years of age, in lieu of care and supervision ordinarily provided by parents in their own homes, with or without charge, are engaged in providing child day care for purposes of Title 51. Such providers and their facilities shall be classified as defined below and shall be subject to the applicable provisions of Titles 51, 18 and 20 of these ordinances, and applicable state law.

Sec. 51-2-17.11. Day care centers (nurseries, preschools, etc.). Persons, associations, institutions or agencies, which provide day care for three or more children and/or educational opportunities for children under age seven (7), for periods of more than four (4) hours in any one day. Small group day care center operated in a provider's home may qualify for classification as registered home day care or registered home preschools.

Sec. 51-2-17.12. Day Care, hourly centers. Any day care center, provider, or other facility where day care and/or educational opportunities are provided for three or more children for four (4) hours or less in any one day. Small group hourly day care centers operated in a provider's home may qualify for classification as registered home day care or registered home preschools.

Sec. 51-2-17.13. Day Care/ Preschool. A person, association, institution or agency which advertises itself as a preschool and which provides care and emphasizes educational opportunities for children under age seven (7). Notwithstanding educational emphasis, if a child receives care for more than four (4) hours per day, the facility shall be regulated as a day care center. Small preschools (under 7 children) operated in provider's home may qualify for classification as registered home preschool.

Sec. 51-2-17.14. Day care, non-registered home. A person which uses his/her principal place of residence to provide day care for no more than two (2) children.

Sec. 51-2-17.15. Day care, registered home. A person who uses his/her principal place of residence to provide day care for small groups in excess of two children. The group size at any given time shall not exceed six, including the provider's own children under age six. The group shall not include more than two infants (under two years) or additional school age children unless in compliance with state regulations applicable to group composition. A registered home day care may be conducted as an hour center or day care center depending on whether any child receives day care for periods exceeding four (4) hours per day.

Sec. 51-2-17.16. Day care, registered home preschool. A person who uses his/her principal place of residence to provide educational opportunities for pre-grammar school age children (under age 7) in small groups. The group size at any given time shall not exceed six, including the provider's own children under age six. If any child, other than the provider's, remains for a period in excess of four (4) hours, the preschool shall also be considered as a day care center and be subject to applicable regulations.

Sec. 51-2-17.5 Decibel. ***

Sec. 51-2-34. Home Occupation. "Home Occupation" shall mean any use conducted entirely within a building and carried on by persons residing in the dwelling unit. This accessory use is clearly incidental and secondary to the use of the dwelling for dwelling purposes and does not change the character thereof and in connection with which there is no display, no stock in trade, and no employees. Said home shall be the principal residence of the occupants. The home occupation shall not include the sale of commodities, except those which are produced on the premises, and shall not involve the use of any accessory building, yard or activity outside of the main building.

In particular a home occupation includes, but is not limited to, the following: The use of the home by a physician, surgeon, dentist, lawyer, engineer, or other professional person for consultation or emergency treatment, but not for the general practice of his profession; the occupation of a dressmaker, milliner or seamstress who has no assistants; the occupation of a musician who teaches voice, piano or other individual musical instrument limited to a single pupil at a time; and non-registered home day care as defined in Section 51-2-17.14. In all cases where a home occupation is being engaged in there shall be no advertising of said occupation, no window displays or signs except as hereinafter permitted, an no employees employed other than persons residing at the residence.

Home occupation shall not be interpreted to include the following: barber shops and beauty shops; commercial stables; kennels; real estate offices, other than an individual in his own home as outlined above; or the teaching of dance to more than one pupil at a time; band instrument instruction in groups; and registered home day care or registered home preschools.

Sec. 51-2-35. Lot. ***

SECTION 2. That Chapter 6 of Title 51 of the Revised Ordinances of Salt Lake City, Utah, 1965, relating to provisions for transitional zones, be and the same hereby is amended by ADDING Section 51-6-14 relating to a special exception providing for child care in residential districts.

Sec. 51-6-14. Special Exception--Child care in residential districts. Where not otherwise authorized by this title, when in the opinion of the Board of Adjustment the interests of the community will be served thereby, the Board of Adjustment may permit as a special exception residential districts to be used for providing child care pursuant to the following provisions and procedures:

(1) Non-registered Home Day Care. Non-registered home day care, as defined in Chapter 2 of this title, may be conducted in the home of the provider of care as a home occupation, subject to the restrictions set forth for home occupations specified in Section 51-2-34 of this Title. No business revenue license or conditional use permit shall be required.

(2) Registered home day care and home preschool facilities. A person desiring to register to operate a registered home day care or registered home preschool facility as defined in Chapter 2 of this Title in their home in a residential district, as an accessory use, must obtain a conditional use permit from the Zoning Department and a regulatory permit

from the Health Department. The permittee is also responsible to obtain appropriate licensing where applicable from the State of Utah under Sections 55-9-1, et seq., Utah Code Annotated, 1953.

(a) Zoning conditional use permit. Application. An application must be submitted to the Zoning Department for a special non-transferable conditional use permit. The fee for said permit shall be ten dollars ($10.00). As a part of the application, the applicant must submit documentation demonstrating that:

(1) The applicant resides at the home in which the business will be conducted;

(2) At no time shall the applicant provide home day care or home preschool services for a group of children exceeding the maximum specified by Sections 51-2-17.15 and 51-2-17.16. The ages and number of all children being cared for or participating shall be stated together with the period of time each child is or will be under the applicant's care each day.

(3) Description of services to be offered.

(4) Declaration as to whether based on period of care per day, applicant desires to be considered a day care center as opposed to hourly care center.

(5) The outdoor play area for the home day care or home preschool shall be located in the rear or side yards of the home for the protection and safety of the children and for the protection of the neighborhood. If such yards are fenced, the fences must comply with zoning ordinances.

(6) The applicant and permitee of a home day care and/or home preschool must agree to conduct the service in a manner of a home occupation, to-wit: There shall be no advertising of said occupation, business or service, no window or other signs or displays, no employees, no use of any accessory buildings, and no play or yard equipment located in the front yard. The use of the home for the services of providing child care shall be clearly incidental and secondary to the use of the dwelling for dwelling purposes and shall not change the character of the home or the neighborhood.

(7) Applicant shall agree to abide by standards set by the Health Department under Chapter 13 of Title 18 where applicable.

(8) That the care and supervision of the children be conducted in a manner which is not a public nuisance to the neighborhood.

(9) Proof of appropriate licensing from the State of Utah where applicable, or basis upon which exemption therefrom is claimed.

(10) Names and addresses of record property owners of land surrounding applicant's residence as reflected by an ownership plat. It is intended this shall include owners of property situated within an 85-foot perameter around the parcel containing applicant's residence.

(11) Once granted, a permittee may request annual renewal by submitting an application with any updated information and a renewal fee of $1.00. A renewal may be approved administratively by Zoning Director finding: (1) apparent compliance with criteria and (2) the absence of any pending complaints against the permittee. Should any complaints be pending or unresolved, action of renewal shall be stayed and deferred until resolution of the complaint.

(b) Hearing, wavier and permit issuance. The initial application (non-renewals) for a special exception conditional use permit to operate a registered home day care or registered home preschool as an accessory use in a residential district shall be subject to the review and approval of the Board of Adjustment to assure compliance with standards set forth above. After the Zoning Director determines an application appears complete and in compliance, the application shall be scheduled for a hearing and review before the Board at one of its regularly scheduled meetings. Notice of the meeting will be mailed to the adjoining property owners listed on (a)(10) above at least one week prior to the meeting. However, said hearing and review by the Board may be waived and conditional approval issued by the Zoning Director, if the applicant presents with the application, the signature of said surrounding property owners specifying they consent or have no objection to the proposed accessory use. The consent and signature of one party appearing of record will be held sufficient to give

constructive notice to all parties holding interests in the parcel and to constitute consent for said parcel. Hearings or consents are not applicable or required for applications for renewals which may be granted on a staff review as described in (a)(11) above. Approval will be subject to obtaining a permit from the Health Department before Zoning may issue a conditional permit or renewal.

(c) Post permit review and hearing. Inasmuch as approvals of initial permits and renewals are based upon representations agreeing to comply with standards set forth above, issuance of the permit either administratively, or after hearing by the Board, will be subject to the continuing jurisdiction of the Board. Review by the Board of Adjustment may be requested by the petition of any administrative officer or adjoining property owner (under (a)(10) above) alleging failure by the applicant and/or permittee to comply with the standards set forth above. Said petition shall state in particularity the supporting facts and details justifying the review for noncompliance. Said review shall be conducted by the Board of Adjustment, after giving at least seven days written notice of the hearing to the permittee, surrounding property owners and each petitioner. Upon review, the Board may enter an order as it deems appropriate, disqualifying the eligibility of the permittee for renewals or reissuance of permits, ordering compliance, revoking or suspending the conditional use permit, and or any other necessary administrative or legal action.

(d) Day care centers, nurseries and preschool. All child day care centers (including hourly care centers), preschools or other similar child care facilities, other than registered home day care and registered home preschools, providing child day care shall be considered a business requiring a business revenue license issued only after the prior approval of the Zoning Department and a regulatory license from the Health Department.

(1) Special exception in "R-1" through "R-5A" districts. Where not otherwise allowed in residential districts, a children's day care facility, including centers, hourly centers and preschools (other than registered home day care or preschool) may apply to the Board of Adjustment for a special exception to conduct its business in a Residential "R-1" through "R-5A" District provided:

(a) Said business is conducted as an accessory use within a church building(s), community center, public or semi-public buildings, or public or private school institutions providing full curriculum to children of grammar school age or older.

(b) The permittee has obtained approval from the State of Utah, to operate the proposed facility in compliance with state regulations, and is otherwise in good standing with State, or is exempt from such regulations.

(c) The maximum number of children which can be cared for at a given time in the facility (as determined by the health department on the capacity of the facility or otherwise specified by the State) is specified and may not be exceeded.

(d) That the building site must provide adequate space for off-street parking of parents and staff and safe off-street areas for dropping and picking up children.

(e) That the manner of operation or the care or supervision of the children and related activities does not constitute a public nuisance in the neighborhood.

(f) The Board of Adjustment may impose such reasonable conditions related to the operation of the proposed centers including maximum numbers of children to ensure the purposes of this ordinance are preserved.

SECTIONS 2. That Sections 18-13-1 through 18-13-13 of the Revised Ordinances of Salt Lake City, Utah 1965, relating to the "children's care centers", be, and the same hereby are, AMENDED to read as follows:

Sec. 18-13-1. Definitions. For the purpose of this chapter the following phrases, terms and words shall have the meanings herein given.

(1) Day Care Center. Children's day care center shall mean any nursery, person, association, corporation, institution, or agency which provides care and supervision for three or more children under 18 years of age in lieu of care and supervision ordinarily provided by parents in their own homes for periods of more than four (4) hours in any one day with or

without charge. Registered home day care and registered home preschools, (defined in Sections 51-2-17.15 and 17.16), may also be included if children are cared for more than four (4) hours per day. Hourly day care centers are excluded.

(2) Hourly Day Care Center. Hourly day care center shall include any day care center, registered home day care or registered home preschool (as defined in Sections 51-2-17.15 and 51-2-17.16) or any nursery, person, association, corporation, institution or agency which provides care and supervision for three or more children under 18 years of age in lieu of care and supervision ordinarily provided by parents in their own homes for periods of less thant four (4) hours in any one day with or without charge.

(3) Preschool. Preschool shall include any registered home preschool and/or, any person, association, corporation, institution or agency which advertises itself to be a preschool and which provides care and educational facilities for children under seven (7) years of age with or without charge for less than four (4) hours per day.

(4) Exemption. ***

Sec. 18-13-2. Regulatory Permit Required. It shall be unlawful for any person to conduct, operate, carry on or maintain a facility providing day care as defined in Section 51-2-17.1, et seq. without having a license issued by the State of Utah, if applicable, and a regulatory permit from the Health Department. It shall be unlawful for any person to operate or carry on an hourly day care center or preschool without first obtaining a permit from the Salt Lake City-County Health Department to do so.

Sec. 18-13-2.1. Business License required. It shall be unlawful for any person to conduct, operate, carry on or maintain a children's day care center, hourly day care center, or preschool, excluding registered home day care or home preschool, as herein defined, without additionally obtaining a business license from the Salt Lake City License Department.

Sec. 18-13-3. Application for license or Permit. Every person desiring to obtain an hourly day care center, preschool or day care center license excluding registered home day care and registered home preschool shall make an application to the license department of Salt Lake City. Every person desiring to obtain a conditional use permit for registered home day care or registered home preschool shall make application for permits to the Health and Zoning Departments of Salt Lake City. Said applications shall include such information and data under oath respecting the classification and use for which the license or permit is requested as the License, Zoning or the Health Departments may prescribe, including a description of the child care facility and services and a statement of the personnel programs that are to be used therefor.

Sec. 18-13-4. Fees. The Health Department permit fee for a registered home day care or a registered home preschool (defined in Sections 51-2-17.15 and 51-2-17.16), shall be one dollar ($1.00) per annum or any part thereof. A regulatory license permit fee for all other child care facilities, including hourly day care center, preschool or day care centers other than registered home day care or registered home preschools, shall be $15.00.

Sec. 18-13-5. Referral to Health department. Upon receipt of an application for a permit for a registered home day care or a registered preschool, or upon the receipt of an application for a license permit for a facility providing child care or preschool services, said applications for permits and/or licenses shall be referred by Zoning or Licensing Departments to the Health Department.

Sec. 18-13-6. Issuance of permit upon inspection of premises. Upon receipt of an application for a permit or license, the director of the Health Department or his authorized representative, may make an inspection of the premises to be used as a child care facility. If the premises are found to be in compliance with the city ordinances and rules and regulations of the health department, a permit shall be issued by the Health Department approving the use of such facility, subject to zoning approval. The Board of Health shall cause a copy of such permit to be filed with the license or zoning department. No license or conditional use permit shall be issued without a copy of the regulatory permit or the written approval of the

Health Department. Any license issued without approval from Zoning and Health Departments is voidable. In the event the premises upon such inspection are found not in satisfactory compliance with the ordinances and the rules and regulations of the Health Department, no such permit shall be issued and no license or conditional use permit shall be issued.

Sec. 18-13-7. Duration of license. The licenses and permits provided for in this chapter shall run from the original date of approval to December 31 of the year in which it is approved. All renewals shall run for a 12-month period starting January 1 and ending December 31 of each year, unless sooner revoked.

Sec. 18-13-8. Suspension and revocation of permit and license. The permit issued under this chapter may be suspended or revoked by the director of the Health department upon the violation by the holder of any of the terms of this ordinance, whereupon the permit issued shall automatically be suspended or revoked. Except as hereinafter provided, the suspension or revocation of said permit shall take effect thirty days after written notice by the director of the Health Department to the permittee advising the latter of the contemplated suspension or revocation and setting forth the reasons for such action.

Sec. 18-13-9. Id. Hearing. At any time before the suspension or revocation date, permittee may request a hearing on said proposed suspension or revocation before the Board of Health which board shall pass finally upon the matter of such suspension or revocation. The notice to the permittee, hereinabove referred to, shall advise him of the right to such hearing. Action by the Board shall be referred to Zoning and Licensing Departments.

Sec. 18-13-10. Id. Emergency. Hearing waived. When in the opinion of the director of the Health Department there exists an emergency which may endanger the public health or safety, the director of the Health Department is empowered to declare an emergency and immediately suspend any or all such permits as may be required, without a hearing or prior notice.

Sec. 18-13-11. Operation without permit daily offense. The operation of any child care facility without having in full force and effect required permits and license from the City to operate shall be in violation of this chapter and each day of operation without such permit being in full force and effect shall be construed as a separate violation and punishable as such.

Sec. 18-13-12. Plan approval required for new or altered facilities. ***

Sec. 18-13-13. Inspection by Salt Lake City-County Health Department. It shall be the duty of the director of the Health Department or his authorized representative, to visit and inspect all hourly care centers, preschools, and day care centers for the purpose of determining the sanitary conditions therein and to determine whether the same are being conducted in compliance with this ordinance and the rules and regulations of the Salt Lake City-County Health Department.

Sec. 18-13-14. Posting and filing of results. ***

SECTION 4. This ordinance shall take effect upon its first publication.

Passed by the City Council of Salt Lake City, Utah, this 29th day of October, 1981.

/s/ Palmer DePaulis
CHAIRMAN

ATTEST:
/s/ Kathryn Marshall
CITY RECORDER

Transmitted to Mayor on October 30, 1981

Mayor's Action:

/s/ Ted L. Wilson
MAYOR

ATTEST:
/s/ Kathryn Marshall
CITY RECORDER
(SEAL)
BILL 78 of 1981
Published Nov. 1, 1981
D-79

harmful to themselves or others. This home must comply with guidelines set forth in section 51-6-12 and the maximum number of persons being supervised in any group home shall be limited to twelve persons, and may be less depending upon the maximum set for various use districts. Bill No. 30, 1981

Sec. 51-2-33.1. **Hard surfaced.** "Hard surfaced" shall mean concrete or asphalt surface.

Sec. 51-2-33.2. **Historic buildings.** "Historic building" shall mean any building listed in the National Register of Historic Places or on the Utah State Register of Historic Sites.

Sec. 51-2-34. **Home occupation.** "Home occupation" shall mean any use conducted entirely within a building and carried on by persons residing in the dwelling unit. This accessory use is clearly incidental and secondary to the use of the dwelling for dwelling purposes and does not change the character thereof and in connection with which there is no display, no stock in trade, and no employees. Said home shall be the principal residence of the occupants. The home occupation shall not include the sale of commodities, except those which are produced on the premises, and shall not involve the use of any accessory building, yard or activity outside of the main building.

In particular a home occupation includes, but is not limited to, the following: The use of the home by a physician, surgeon, dentist, lawyer, engineer, or other professional person for consultation or emergency treatment, but not for the general practice of his profession; the occupation of a dressmaker, milliner or seamstress who has no assistants; the occupation of a musician who teaches voice, piano or other individual musical instrument limited to a single pupil at a time; and nonregistered home day care as defined in Section 61-2-17.14. In all cases where a home occupation is being engaged in there shall be no advertising of said occupation, no window displays or signs except as hereinafter permitted, and no employees employed other than persons residing at the residence.

Home occupation shall not be interpreted to include the following: barber shops and beauty shops; commercial stables; kennels; real estate offices, other than an individual in his own home as outlined above; or the teaching of dance to more than one pupil at a time; band instrument instruction in groups; and registered home day care of registered home preschools. Bill No. 78, 1981

Sec. 51-2-34.1-4. **Reserved.** Bill No. 30, 1981

Sec. 51-2-34.5. **Hospital.** An institution providing qualified health, medical and surgical staff and related personnel services for the diagnosis, treatment and recovery care of persons suffering from disease or injury, primarily on an inpatient basis. Short term surgical centers or clinics providing 24 hour care, shall be considered hospitals. A hospital may include integral support service facilities such as laboratories, outpatient units, training and centeral services together with staff offices necessary to the operation of the hospital. Bill No. 30, 1981